No. 09-104 (2)

140

IN THE

Supreme Court of the United States

MOTION FILED

AUG 20 2009

AD HOC COMMITTEE OF KENTON COUNTY BONDHOLDERS,
Petitioners,

v.

DELTA AIR LINES, INC. KENTON COUNTY AIRPORT BOARD, UMB BANK, N.A., AS TRUSTEE, POST EFFECTIVE DATE COMMITTEE AS SUCCESSOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF DELTA AIR LINES, INC.,
Respondents.

CORRECTED COPY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF PROFESSOR GEORGE W. KUNEY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PLEASE CHANGE COUNSEL OF RECORD ↗

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August 20, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

09-5327

Supreme Court, U.S.
FILED
MAY 13 2009
OFFICE OF THE CLERK

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW THE PETITIONER, ALBERT HOLLAND, by and through his undersigned counsel, and herein moves for leave to proceed *in forma pauperis*. In support thereof, Petitioner would state:

1. Petitioner is an indigent death-sentenced inmate in the State of Florida.
2. On this date, Petitioner is filing a Petition for A Writ of Certiorari to the Eleventh Circuit Court of Appeals.
3. Petitioner, who is without funds, seeks leave to proceed in this matter *in forma pauperis*.
4. The undersigned counsel was appointed by the United States District Court for the

ORIGINAL

(6)

Southern District of Florida, and by the Eleventh Circuit Court of Appeals, pursuant to the Criminal Justice Act.

WHEREFORE, Petitioner moves to proceed *in forma pauperis*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by U.S. Mail to Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on this 13th day of May, 2009.

TODD G. SCHER
Counsel for Petitioner

09-532

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED--CAPITAL CASE

In determining that Petitioner was not entitled to equitable tolling to excuse the late filing of his habeas petition, the Eleventh Circuit determined that the reason for the late filing was the "gross negligence" on part of Petitioner's state-appointed collateral attorney's failure to file the petition in a timely fashion despite repeated instructions from the Petitioner to do so. However, under the new test announced by the Eleventh Circuit in Petitioner's case, *no* allegation of attorney negligence or failure to meet a lawyer's standard of care, in the absence of bad faith, dishonesty, divided loyalty, or mental impairment, could *ever* qualify as an exceptional circumstance warranting equitable tolling.

This Court should grant *certiorari* to the Eleventh Circuit to determine whether "gross negligence" by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling, or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond "gross negligence" must be established before an extraordinary circumstance can be found that would warrant equitable tolling.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petitioner, Albert Holland, respectfully petitions this Court for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINION BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit in this cause is reported as *Holland v. Florida*, 539 F. 3d 1334 (11th Cir. 2008), and is attached hereto as Attachment A. A timely petition for rehearing and rehearing *en banc* was denied on January 13, 2009 (Attachment B). An extension of time to file the instant petition was granted by Justice Thomas up to and including April 13, 2008. This petition is timely filed.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244 (d) provides:

> (1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in state custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

PROCEDURAL HISTORY

A. Trial/Direct Appeal Proceedings.

Petitioner was indicted on or about August 16, 1990, in Broward County, Florida, on four counts, including first-degree premeditated murder. He pled not guilty and, after a jury trial, was convicted and sentenced to death for the first-degree murder count, life imprisonment for sexual battery, forty (40) years for attempted first-degree murder, and seventeen (17) years imprisonment for armed robbery. On direct appeal, however, the Florida Supreme Court reversed and remanded for a new trial. *Holland v. State*, 636 So. 2d 1289 (Fla. 1994).

On retrial, Petitioner was again found guilty,[1] and, at a penalty phase, the jury recommended a sentence of death by a vote of eight (8) to four (4). He was thereafter sentenced to death on the first-degree murder count, life imprisonment on the armed robbery count, fifteen (15) years imprisonment on the attempted sexual batter count, and thirty (30) years on the attempted first-degree murder count. On direct appeal, the Florida Supreme Court affirmed the judgments of conviction and sentences, including the sentence of death. *Holland v. State*, 773 So. 2d 1065 (Fla. 2000). *Certiorari* review was denied on October 1, 2001. *Holland v. Florida*, 534 U.S. 834 (2001).

B. State Postconviction Proceedings.

On October 1, 2001, pursuant to state procedures, *see* Fla. R. Crim. P. 3.851

---

[1] However, at the retrial, Petitionerwas found guilty of the lesser offense attempted sexual battery, rather than sexual battery as alleged in Count 3 of the indictment.

(b), the Florida Supreme Court assigned the Office of the Capital Collateral Regional Counsel–South [CCRC-South] to represent Petitionerfor purposes of his collateral representation. However, CCRC-South moved to withdraw and, on November 2, 2001, the state circuit court appointed attorney Bradley Collins to represent Petitioner pursuant to the "registry" list of attorneys. Following the discovery process permitted under Fla. R. Crim. P. 3.852, *see generally* DE16 at 3-4, Petitioner, through Mr. Collins, filed his motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 on or about September 17, 2002. The motion was ultimately denied by the state circuit court and affirmed by the Florida Supreme Court on November 10, 2005. *Holland v. State*, 916 So. 2d 750 (Fla. 2005). No motion for rehearing was filed by Mr. Collins and, as a result, the mandate issued from the Florida Supreme Court on December 1, 2005.[2] Mr. Collins never informed Petitioner that his appeal had been denied by the Florida Supreme Court nor that the mandate had issued, thus triggering the time in which a timely petition for writ of habeas corpus needed to be filed.

Petitioner thereafter filed a *pro se* petition for writ of habeas corpus (DE1).[3] Petitioner thereafter moved the court to discharge attorney Collins and to appoint new counsel (DE6). After ordering both the Respondent and Collins to file

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[2]Mr. Collins, on behalf of Petitioner, did file a petition for *certiorari* review in this Court on February 8, 2006, a petition which was denied on April 17, 2006. *Holland v. Florida*, 126 S.Ct. 1790 (2006).

[3]The circumstances leading up to the filing of Petitioner's *pro se* petition are fully discussed in the section of this Petition discussing the reasons that the writ should be granted in this case.

responses to Petitioner's motion, and after reviewing these responses, the court ultimately entered an order appointing the undersigned counsel to represent Petitioner (DE22). The Petitioner, through undersigned counsel, thereafter filed a consolidated pleading (with an extensive appendix) in which he alleged his entitlement to equitable tolling and to an evidentiary hearing (DE35, 38). The Respondent filed a sur-reply (accompanied by an appendix) in which it contended that Petitioner was not entitled to equitable tolling (DE41). On April 27, 2007, the district court entered an order dismissing Petitioner's §2254 petition as untimely, concluding that equitable tolling was not warranted (DE46). A motion to alter or amend judgment, and supplement thereto, was filed; following a response by the Respondent (DE49), the court denied the motion (DE52). A timely notice of appeal was filed (DE53), and the district court granted a COA on the issue of whether the Petitioner was entitled to equitable tolling (DE60).

On August 18, 2008, the Eleventh Circuit affirmed the district court's dismissal of Petitioner's habeas corpus proceeding. Declining to conclude that Petitioner was not diligent in his efforts, the Eleventh Circuit focused instead on whether the acts of Petitioner's state collateral counsel were sufficient to constitute an "extraordinary circumstance" sufficient to warrant equitable tolling. Recognizing that attorney misconduct going beyond "mere negligence" could constitute an extraordinary circumstance warranting equitable tolling (Attachment

A at 8) (citing *Downs v. McNeil*, 529 F. 3d 1311 (11th Cir. 2008),[4] and that Petitioner's state collateral counsel acted in a "grossly negligent" manner in his representation of Petitioner and his failure to file a federal habeas petition "despite repeated instructions to do so," (Attachment A at 9), the Eleventh Circuit concluded that

> no allegation of lawyer negligence or of failure to meet a lawyer's standard of care–in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part–can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This is pure-professional-negligence case. . . .

(Attachment A at 9-10).

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[4] *Downs* had issued while Petitioner's case was pending before the Eleventh Circuit and shortly before Petitioner's appeal was disposed of by that Court.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE APPROPRIATE STANDARD FOR EQUITABLE TOLLING WHEN LATE FILING OF A HABEAS PETITIONER IS DUE TO THE "GROSS NEGLIGENCE" OF STATE COLLATERAL COUNSEL , AND WHETHER THE "GROSS NEGLIGENCE" OF STATE COLLATERAL COUNSEL CAN CONSTITUTE AN EXTRAORDINARY CIRCUMSTANCE SUCH THAT EQUITABLE TOLLING IS APPROPRIATE TO EXCUSE A LATE PETITION.

In affirming the dismissal of Petitioner's habeas corpus petition as untimely, the Eleventh Circuit set out a bright-line standard for determining under what circumstances the actions of a state collateral lawyer's actions, or inactions, can rise to the level of an "extraordinary circumstance" such that a habeas petitioner's late filing can be excused under the doctrine of equitable tolling. In Petitioner's case, the Eleventh Circuit found that Petitioner's state collateral counsel acted in a "grossly negligent" manner in his "failure to file a federal habeas petition timely, despite repeated instructions to do so" (Attachment A at 9). However, despite finding that counsel had acted in a "grossly negligent" manner, the Eleventh Circuit condoned his behavior by concluding that "no allegation of lawyer negligence or of failure to meet a lawyer's standard of care–in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part– can rise to the level of egregious misconduct that would entitle Petitioner to equitable tolling" (Attachment A at 9-10). The Eleventh Circuit's stubborn refusal to acknowledge that "gross negligence" is sufficient to warrant equitable tolling is in conflict with the holdings of other

circuits and is a near-impossible standard to meet. If the late filing is due to the "gross negligence" of state collateral counsel, as it was in the instant case, Petitioner submits that an exceptional circumstance has been established and that equitable tolling is warranted.

Despite the State of Florida's promise to Petitioner that he have counsel to competently and effectively represent him in both his state and federal postconviction litigation, a promise that would be purportedly enforced by judicial monitoring,[5] Petitioner's state collateral attorney, Mr. Collins, failed to timely file a §2254 petition on behalf of Petitioner.[6] Petitioner, *pro se*, filed a habeas corpus

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[5]When Florida created the registry system, it took the important step of creating an affirmative obligation for the state courts to monitor registry counsel. Fla. Stat. §27.11(12) reads:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, *or the failure to file appropriate motions in a timely manner*.

(emphasis added). The Florida Supreme Court has also held that because state collateral counsel are appointed by operation of statute, such representation must be effective in order to give any meaning to the statutory provision. *See Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988).

[6]When Mr. Collins was appointed to represent Petitioner, he was contractually bound by the mandates of Fla. Stat. §27.711(2) (2005), which provides:

> After appointment by the trial court under s. 27.710, the attorney must

petition pursuant to 28 U.S.C. §2254, on January 19, 2006.[7] In the district court and the Eleventh Circuit, Respondent argued that Petitioner's petition was filed thirty-eight (38) days beyond the one-year statute of limitations set forth in 28 U.S.C. §2244 (d)(1) (DE14 at 10 *et. seq.*). In light of the late filing, Petitioner acknowledged the late filing but urged that he was entitled to equitable tolling for a number of reasons.

Equitable tolling of the AEDPA statute of limitations for filing a federal habeas corpus petition set forth in 28 U.S.C. §2244(d)(1) is appropriate where: (1) the petitioner has been prevented from asserting his rights in some extraordinary way, and (2) the petitioner has exercised reasonable diligence. *See, e.g. Merritt v. Blaine*, 326 F. 3d 157, 168 (3d Cir. 2003); *Sandvik v. United States*, 177 F. 3d 1269, 1271 (11th Cir. 1999); *Marsh v. Soares*, 223 F. 3d 1217, 1220 (10th Cir. 2000). As the Eleventh Circuit has explained, equitable tolling is available to a habeas petitioner who "untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik*, 177 F. 3d at 1271. *Accord Steed v. Head*, 219 F. 3d 1298, 1300 (11th Cir. 2000).

> immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, *including federal habeas corpus proceedings*, in accordance with this section or until released by order of the trial court.

(emphasis added).

[7]The State of Florida acknowledged in the district court litigation that January 16, 2006, the date that Petitioner signed the petition, was the "filing" date due to the "mailbox rule" applicable to a prisoner filing (DE14 at 12 n.4).

While equitable tolling is an "extraordinary remedy" to be applied "sparingly," *id.*, it is nonetheless a remedy that can be applied when a court finds that a petitioner has made a sufficient showing of both extraordinary circumstances and diligence. *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). Although equitable tolling is not appropriate in cases of "garden variety excusable neglect," *Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990), it should be evaluated on a case-by-case basis and granted upon the establishment of a "unique, specific set of facts." *Browning v. AT&T Paradyne*, 120 Fl. 3d 222, 227 (11th Cir. 1997). *See also Arthur v. Allen*, 452 F. 3d 1234, 1253 (11th Cir. 2006) ("A determination as to whether rare and exceptional circumstances are presented requires the examination of the facts in each case") (citing *Knight v. Schofield*, 292 F. 3d 709, 711 (11th Cir. 2002)). The "focus" of the inquiry is on the circumstances surrounding the late filing of the habeas petition, and not on the circumstances of the underlying conviction. *Arthur v. Allen, supra* at 1253.

Given the extraordinary circumstances in this case and the diligence established by the Petitioner,[8] this Court should grant certiorari review of the Eleventh Circuit's decision in this case for the following reasons.

A. Facts In Support of Equitable Tolling.

Despite a long and documented history of an "unstable mental condition," *Holland v. State*, 773 So. 2d 1065, 1069-70 (Fla. 2000), Petitioner's own actions more than establish both extraordinary circumstances accompanied by the

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[8]The Eleventh Circuit never addressed the issue of Petitioner's diligence.

requisite showing of diligence such that equitable tolling is appropriate. It is difficult to imagine what else Petitioner could have done; if the circumstances presented below do not establish diligence, then the concept simply has no relevant meaning. Indeed, the Eleventh Circuit did not attribute the late filing of Petitioner's habeas petition to a lack of diligence; rather, the direct cause of the late filing was due to the fact that Mr. Collins acted in a "grossly negligent" manner in failing to timely file the petition "despite repeated instructions to do so" from Petitioner (Attachment A at 9)

Early on in Mr. Collins's representation of Petitioner in state court, Petitioner sought assurances from Mr. Collins that his deadlines, both state and federal, would be honored. For example, in early 2002, Petitioner sought reassurance from Mr. Collins that his state postconviction motion would be filed timely and that his federal habeas deadline be secured; in response, Mr. Collins informed Petitioner that he was "aware of state time-limitations and federal exhaustion requirements" (DE38, Appendix B). Unsatisfied with Mr. Collins's representation in the time period leading up to and including the filing of his Rule 3.851 motion, Petitioner sought to file, in the state circuit court, a motion to supplement the record with additional issues that Mr. Collins did not include as claims for relief; the state circuit court, however, struck Petitioner's pleading as a nullity in light of the fact that he was represented by counsel (DE38, Appendix

C).[9] In his December 23, 2002, correspondence to Petitioner, Mr. Collins noted that Petitioner's claims "will [] be ripe for presentation in a petition for writ of habeas corpus in federal court" should the Florida Supreme Court deny collateral relief and "should the United States Supreme Court deny any petition for writ of certiorari" (DE38, Appendix C at 3).[10] Mr. Collins further reassured Petitioner by letter dated January 22, 2003, that if the circuit court were to deny relief, he would ensure that the "proper appeals" would be undertaken and asked for Petitioner's "confidence" and "sense of unity" in "this very delicate matter" (DE38, Appendix F).

An evidentiary hearing on Petitioner's Rule 3.851 motion took place in April, 2003, and the state circuit court denied relief in May, 2003. Remaining unsatisfied with Mr. Collins's representation, Petitioner, on July 18, 2003, filed a

---

[9]Logs generated by the Florida Department of Corrections establish that from the time of his appointment until his representation ceased in 2006, Mr. Collins visited Appellant at Union Correctional Institution only two times prior to the filing of the Rule 3.851 motion: on January 29, 2002, for approximately three (3) hours, and again on September 13, 2002, for approximately 90 minutes (DE38, Appendix D). Mr. Collins's investigator, Don Carpenter, visited Appellant two times Union Correctional Institution, on October 4, 2002, and November 6, 2002, both of which were subsequent to the filing of the Rule 3.851 motion (DE38, Appendix E). Mr. Collins did also meet with Appellant one time while Appellant was in Broward County for his evidentiary hearing in April, 2003.

[10]Based on this language, it is clear that Mr. Collins was under the belief that Petitioner's time to file his federal habeas petition would continue to be tolled until this Court denied certiorari from the state courts' determination of his collateral claims for relief. Significantly, in 2002, Mr. Collins did not take the position that Petitioner's statute of limitations had already expired by the time he was appointed in November, 2001; Mr. Collins substantially changed his position when confronted with the fact that he had missed the deadline to file Petitioner's habeas petition.

grievance with The Florida Bar, noting that his Rule 3.851 motion had been denied on May 16, 2003, that Mr. Collins had failed to adequately represent him, and that he was concerned that his legal issues be presented to the state courts so they "will not be procedurally barred when I get to the Federal Courts" (DE38, Appendix G). The Florida Bar, on August 20, 2003, refused to initiate an investigation into Petitioner's complaints, however (DE38, Appendix H). In the meantime, while Petitioner's complaints were pending with The Florida Bar, he sought relief in the Florida Supreme Court on August 8 and 18, 2003 (DE38, Appendix I at 1).[11] The State of Florida moved to strike these pleadings because they were unauthorized as Petitioner was represented by counsel (DE38, Appendix I at 1), and, on October 30, 2003, the Florida Supreme Court granted the State of Florida's motion (DE38, Appendix I at 2).

Petitioner's concern at this time was the fact that Mr. Collins had not been in communication with him concerning the pending appeal; as evidenced in the Florida Supreme Court's docket, Petitioner himself inquired by letter to the Florida Supreme Court as to the status of when the appeal was filed and when the record on appeal was due to be filed (DE38, Appendix I at 1). Petitioner again

---

[11]According to the Florida Supreme Court docket, Petitioner's *pro se* pleadings were construed as motion to amend and supplement state habeas corpus petition (DE38, Appendix I). However, Mr. Collins had not yet filed a state habeas corpus petition for Petitioner; it was not filed until January 9, 2004 (DE38, Appendix J). Of course, given Petitioner's lack of legal knowledge and the fact that he was suffering what the Florida Supreme Court determined to be an "unstable mental condition," the fact that he was confused about what to file and when further establishes that Mr. Collins had a heightened duty to keep Petitioner informed of the status of his case.

contacted the Florida Supreme Court as reflected in the November 24, 2003, docket entry, and the Court advised Petitioner when his Initial Brief was due to be filed (DE38, Appendix I at 2). After another unsuccessful attempt to amend and supplement a state habeas petition (DE38, Appendix J at 1), Petitioner, on February 23, 2004, filed a *pro se* motion to remove Mr. Collins as his counsel and to appoint competent conflict-free counsel (DE38, Appendix I at 2; Appendix J at 1). The State of Florida opposed the motion, and, on May 5, 2004, the Florida Supreme Court granted the State's motion and struck Petitioner's *pro se* motion (DE38, Appendix I at 3).

In the meantime, Petitioner, still not able to get updated information from Mr. Collins about the status of his case, wrote to the Florida Supreme Court on April 23, 2004, requesting a copy of the State's Answer Brief, which had been filed on April 15, 2004 (DE38, Appendix I at 3). On April 29, 2004, the Florida Supreme Court advised Petitioner that he would have to pay for copies of the requested documents (Appendix I at 3). It was *after* the Florida Supreme Court was aware that Mr. Collins had not provided Petitioner with the State's Answer Brief that, on May 5, 2004, it granted the State's motion to strike Petitioner's *pro se* request for competent counsel to represent him. At no time did the Florida Supreme Court appear to even attempt to engage in any "monitoring" of Mr. Collins's performance pursuant to its statutory mandate. *See supra* n.6.

Petitioner again sought to remove Mr. Collins on June 17, 2004, this time requesting a hearing pursuant to *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA

1973) (DE38, Appendix I at 3; Appendix J at 2).[12] On July 7, 2004, the Florida Supreme Court ordered both Mr. Collins and the State to respond (DE38, Appendix I at 4; Appendix J at 2). Without ordering a hearing, the Florida Supreme Court, on October 22, 2004, denied Petitioner's motion, again without attempting to comply with its mandated oversight of Mr. Collins's representation of Petitioner (DE38, Appendix I at 4).

The briefing in Petitioner's appeal to the Florida Supreme Court was concluded by the filing of his Reply Brief on June 16, 2004 (DE38, Appendix I at 3). Oral argument was conducted on February 10, 2005 (DE38, Appendix I at 4). On March 3, 2005, Petitioner wrote to Mr. Collins the following, in pertinent part:

> I write this letter to ask that you please write me back as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of Florida.
>
> If the Florida Supreme Court denies my 3.850-3.851 and state habeas corpus appeals, **please file my 28 U.S.C. 2254 writ of habeas corpus petition, before my deadline to file it runs out (expires).**

(DE38, Appendix K) (emphasis added). Having heard nothing from Mr. Collins despite his written request for a status, Petitioner, on June 15, 2006, again wrote to Mr. Collins:

> On March 3, 2005, I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.

---

[12]In *Nelson*, the court set forth a procedure requiring a trial court to inquire of a defendant and appointed counsel when allegations of incompetency are made and, if established, to appoint substitute counsel or allow the defendant to proceed *pro se*. *Nelson*, 274 So. 2d at 259.

Also, have you begun preparing my 28 U.S.C. §2254 writ of habeas corpus petition? Please let me know, as soon as possible.

(DE38, Appendix L) (emphasis added).[13]

Not only was Petitioner vainly attempting to secure the status of his appeal from Mr. Collins, he was also informing Mr. Collins about the need to begin preparing his federal habeas corpus petition so that it would be filed within the deadline. However, as noted above, Petitioner received no response at all from Mr. Collins. Undeterred, Petitioner took additional steps while his case was still in state court in order to keep updated as to the status of his appeal. In October, 2005, Petitioner contacted the Florida Supreme Court about how to find his case on its website so that Petitioner could secure the assistance of outside supporters to keep him updated about the appeal;[14] in response, the Florida Supreme Court clerk mailed him printouts of the website with instructions as to which menu options should be used (DE38, Appendix N).

On November 10, 2005, the Florida Supreme Court issued its opinion

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[13]Mr. Collins never responded to either of Petitioner's afore-discussed letters, a fact that is conclusively established by the Department of Corrections logs, which provide meticulous detail as to each and every piece of incoming mail sent to death row inmates. In preparation for an equitable tolling argument in the lower courts, Petitioner sought these logs from the Department of Corrections on February 5, 2006; Sergeant Overtrop of Union Correctional Institution responded to Petitioner's request by informing him that he pulled "all logs" from January 1, 2004, until February 6, 2006, and these logs revealed that Petitioner received only five (5) pieces of mail from Mr. Collins during this time period: January 14, 2004, June 16, 2004, July 19, 2004, January 19, 2006, and February 6, 2006 (DE38, Appendix M).

[14]There are no computers accessible to any death-row inmates at Union Correctional Institution.

affirming the denial of the Rule 3.851 appeal and denied the state habeas petition. Shockingly, Mr. Collins **never informed Petitioner, either by legal phone call or by letter, that his appeal had been denied.**[15] Because he was unaware that the appeal had been denied, he again contacted the Florida Supreme Court by letter dated December 21, 2005, in order to inquire about the status of his case and when the mandate from his direct appeal had issued (DE38, Appendix P).[16] In a written communication dated December 28, 2005, the Florida Supreme Court, referring to Case No. SC03-1033 (which was the case number for Petitioner's Rule 3.851 appeal), informed Petitioner that he would need to contact the Florida State Archives in order to obtain the mandate issued in his direct appeal case (DE38, Appendix O). Inexplicably, despite acknowledging that Petitioner's request was also for a status of Case No. SC03-1033, *never* informed him that, in fact, the mandate in the Rule 3.851 appeal had also been issued and that the appeal had been denied on November 10, 2005. And, because he still had no idea that his

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[15]Petitioner received confirmation of this from Sgt. Overtrop pursuant to his request that Overtrop review the phone logs; according to Overtrop, Petitioner received no legal phone calls from Mr. Collins (or anyone else for that matter) in November, 2005 (DE38, Appendix O).

[16]Petitioner believed that the date of the mandate on direct appeal was significant in order for him to be able to ascertain when the federal habeas would be due since he had never heard anything from Mr. Collins about the status of the case. Clearly, this request indicates that Petitioner was making a diligent effort to ascertain how much time he had left on his statute of limitations if and when the Florida Supreme Court were to deny relief (DE38, Appendix Q). Of course, at the time he made his request to the Florida Supreme Court on December 21, 2005, he had no idea that the Court had denied his appeal already and, in fact, mandate had already issued on December 1, 2005.

appeal had been denied, Petitioner, on January 9, 2006, requested permission from the Department of Corrections to visit the "writ room" in order to see if he could ascertain the status of his case from the legal library (DE38, Appendix R); however, the Department of Corrections inexplicable "refused" his request (*Id.*). Because this request to visit the writ room was denied, Petitioner *again* wrote to Mr. Collins on January 9, stating as follows:

> I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. **Have my appeals been decided yet?**
>
> Please send me the date when the "mandate" was issued in my case.[17] If you could please send me a copy of said "mandate" so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable "Antiterrorism and Effective Death Penalty Act," **if my appeals before the Supreme Court of Florida are denied.**
>
> Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.
>
> Mr. Collins, would you also please inform me, as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will be have to be timely filed in and that court's address?
>
> Thank you very much.

(DE38, Exhibit Q) (emphasis added).

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[17]Petitioner's inquiry of Mr. Collins puts into context his request of the Florida Supreme Court on December 21, 2005, for a copy of the direct appeal mandate. Petitioner did follow through with the Florida Supreme Court's direction that he contact the Florida State Archives in order to get a copy of the direct appeal mandate; on January 27, 2006, Petitioner received the requested documents from the Archives (DE38, Appendix S).

Having still not heard anything from Mr. Collins, having not been informed by the Florida Supreme Court's December 28, 2005, communication, that his appeal had been already denied and that mandate had been issued, and having been inexplicably denied the opportunity to go to the writ room on January 9, 2006, Petitioner again, on January 18, 2006, requested and was granted permission to go to the writ room to attempt to ascertain the status of his case (DE38, Appendix T). It was on this date–January 18, 2006–that Petitioner learned for the first time that his appeal had already been denied over two (2) months earlier. As a result, Petitioner, the following day–January 19, 2006–made an emergency request for a telephone call to Mr. Collins the first thing in the morning because, as Petitioner himself wrote, "It's important!!" (DE38, Appendix U). That request was approved (*id.*). Because he was now aware that his state appeals had been denied over two (2) months earlier, Petitioner, following his visit at the writ room on January 18, 2006, immediately prepared his *pro se* habeas corpus petition, which he mailed to the district court clerk for filing on January 19, 2006.

Coincidentally, Mr. Collins had written a letter to Petitioner which Petitioner received on January 19, 2006 (the same day that Petitioner mailed his *pro se* habeas petition to the district court), requesting that Petitioner fill out the *in forma pauperis* documentation necessary to file a *certiorari* petition in this Court (DE38, Appendix V). By the time Petitioner received this letter, he had already spoken with Mr. Collins in the morning of January 19. In his written response to Mr. Collins's letter on January 20, 2006, Petitioner noted that he was "left to

understand" that Mr. Collins was intent on filing a *certiorari* petition but that it was Petitioner's understanding that the AEDPA statute of limitation was "not tolled" during this period, and therefore advised Mr. Collins "not to file certiorari if doing so affects or jeopardizes my one-year grace period as prescribed by the AEDPA" (DE38, Appendix V).[18]

On January 27, 2006, Petitioner again communicated with Mr. Collins to request information on what Mr. Collins had filed on Petitioner's behalf and to send him copies (DE38, Appendix W), and, on January 30, 2006, again wrote to Mr. Collins with some legal research indicating that the time for seeking *certiorari* from the state court's denial of collateral relief would not toll the AEDPA statute of limitations (DE38, Appendix X). In response to Petitioner's letter of January 20, 2006, Mr. Collins acknowledged that there was a "hurdle" to overcome "concerning operation of AEDPA time limitations," but, expressing a gross and negligent understanding of basic federal habeas law, expressed his view that Petitioner's time for filing his federal habeas "began to run after the case was affirmed [by the Florida Supreme Court] on October 2, 2000" and that therefore "the period had run before my appointment and therefore before your Rule 3.850 motion was filed" (DE38, Appendix Y). Mr. Collins further expressed his understanding that a *certiorari* petition was Petitioner's "only technically timely remedy" and that filing a *certiorari* petition "will have no effect on the viability of

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[18]In reality but unbeknownst to Petitioner, his concern was moot since the Florida Supreme Court had denied relief in November, 2005, and Mr. Collins never informed Petitioner of this denial.

the federal habeas corpus remedy" (*Id.*). In response to this letter, Petitioner, on February 9, 2006, wrote to Mr. Collins:

> I received your letter dated January 31, 2006. You are incorrect in stating that "the one-year statutory time frame for filing my 2254 petition began to run after my case was affirmed on October 5, 2000, by the Florida Supreme Court." As stated on page three of my Petition for a Writ of Certiorari, October 1, 2001, is when the United States Supreme Court denied my initial petition for writ of certiorari and that is when my case became final. That meant that time would be tolled once I filed my 3.850-3.851 motion in the trial court.
>
> Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U.S.C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.
>
> You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005, decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you wold immediately inform me of the court's decision as soon as you heard anything.
>
> Mr. Collins, I filed a motion on January 19, 2006, to preserve my rights because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?
>
> Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting any more time (valuable time).
>
> Again, please file my 2254 Petition at once.
>
> Your letter is the first time that you have ever mentioned anything to me about my time had [sic] run out, before you were even appointed to represent me, and that my one-year started to run on October 5, 2000.
>
> Please find out the status of my motion that I filed on January 19, 2006, and let me know.

(DE38, Exhibit Z).

B. "Gross Negligence" by Collateral Counsel is an "Extraordinary Circumstance" Warranting Equitable Tolling.

While it is generally true, and Petitioner does not contend otherwise, that garden variety attorney mistakes do not constitute "extraordinary circumstances" to warrant equitable tolling, the issue presented by Petitioner is whether the "gross negligence" found by the Eleventh Circuit does qualify as such a circumstance, and whether any allegation of lawyer negligence or misconduct, short of bad faith, dishonesty, divided loyalty, or mental impairment, can satisfy the definition of an "extraordinary circumstance" such that equitable tolling is warranted.[19] Under the new test set out by the Eleventh Circuit, *no* allegation of lawyer misconduct, even gross misconduct, can qualify for an exceptional circumstance. This truncated holding essentially eviscerates the doctrine of equitable tolling and conflicts with the holdings of numerous other circuits.

At the outset, it is important to note that, until Petitioner's case was pending in the Eleventh Circuit, that court had not yet addressed whether attorney conduct beyond "mere negligence" could constitute an extraordinary circumstance warranting equitable tolling. In *Downs v. McNeil*, 520 F. 3d 1311 (11th Cir. 2008), the Eleventh Circuit held for the first time that attorney misconduct going beyond "mere negligence" can constitute an extraordinary circumstance warranting

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[19]To be sure, Petitioner does not agree that the "gross negligence" found by the Eleventh Circuit fails to satisfy some of the arbitrary criteria set out in the Eleventh Circuit's opinion. For example, in Petitioner's view, "gross negligence" of counsel certainly qualifies as bad faith and demonstrates, at the least, divided loyalties.

equitable tolling. Yet in Petitioner's case, the Eleventh Circuit effectively announced that *Downs* did not really mean what it said and limited its holding to such an extent as to render it meaningless for purposes of a reasoned equitable tolling analysis and to place Petitioner's case in direct conflict with other circuits.

To properly put Petitioner's contentions in this petition into their proper context, it is first important to discuss what the Eleventh Circuit held in *Downs*, and, just as importantly, what it did not hold in *Downs*. At issue in *Downs* was whether the Eleventh Circuit would join those circuits which have allowed equitable tolling due to "some forms of serious attorney misconduct," or whether this Court would agree with the lone circuit –the Seventh Circuit – to adopt a "bright-line approach" refusing to allow equitable tolling when the reason for the late filing is attributable to the misconduct or negligence, no matter how serious, of the defendant's collateral counsel. *Downs*, 520 F. 3d at 1319. After discussing the holdings of the various circuits, the *Downs* court declined to follow the bright-line approach of the Seventh Circuit in favor of an analysis that truly reflects the fact that equitable tolling is, after all, an *equitable remedy*. *Downs*, 520 F. 3d at 1321 ("bright-line rules do not govern the court's exercise of its equitable powers") (citing cases). Hence, the *Downs* court embraced the line of cases from other circuits which have provided a basis for equitable tolling in instances where, for example, the attorney has made misrepresentations to the client, disregarded the client's instructions, refused to return documents, or abandoned the client's case. *Id.* at 1321-22 (discussing cases). After discussing with approval the line of

cases from other circuits, the *Downs* court concluded by holding that "the fact-specific, case-by-case approach taken by the majority of our fellow circuits is better suited to an equitable inquiry than is the bright-line approach to egregious attorney misconduct adopted by the Seventh Circuit[]." *Id.* at 1322 (footnote omitted).

Nothing in *Downs* could be read to state that only allegations of "reckless factual misrepresentation or of lawyer dishonesty" (Attachment A at 9), could, to the exclusion of any other allegation, constitute an extraordinary circumstance warranting equitable tolling. In fact, in *Downs*, the Court stated it would "not dissect the continuing course of conduct in which counsel engaged, bur rather view counsel's behavior as a whole," and acknowledged that while overt dishonesty could constitute equitable tolling, other factors, such as disregarding client instructions or effective abandonment of the client, could also constitute an extraordinary circumstance warranting equitable tolling. *Downs*, 520 F. 3d at 1321-23.

Yet in Petitioner's case, the Eleventh Circuit indeed focused on the lack of allegations of the overt false representations made in *Downs*, to the exclusion of the Petitioner's other equally serious allegations, and faulted Petitioner for not having similar allegations to those in *Downs*:

> no allegations of lawyer negligence or of failure to meet a lawyer's standard of care–in the absence of an allegation and proof of, bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part– can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This case is a pure

> professional negligence case. We decline to extend *Downs* to the different facts of this case.[]

(Attachment A at 9-10)

As the *Downs* court noted, other circuits have extended equitable tolling to circumstances involving some forms of serious attorney misconduct or negligence, and not just to allegations of overt lying by counsel or actual dishonesty. For example, the *Downs* court cited to and discussed *Baldayaque v. United States*, 338 F. 3d 145 (2d Cir. 2003), noting that the Second Circuit, in considering the allegations there, which included the attorney ignoring the directive of the defendant to file a §2255 petition and failing to communicate with the client, determined that the attorney's actions, "taken together," might warrant equitable tolling. *Downs*, 520 F. 3d at 1321. There was nothing in *Baldayaque* that discussed actual lying or overt dishonesty, yet the *Downs* court cited it with approval, as it also cited other similar cases. *See Fleming v. Evans*, 481 F. 3d 1249 (10th Cir. 2007); *United States v. Martin*, 408 F. 3d 1089 (8th Cir. 2005); *United States v. Wynn*, 292 F. 3d 226 (5th Cir. 2002); *Spitsyn v. Moore*, 345 F. 3d 796 (9th Cir. 2003).[20]

By first embracing this line of cases in *Downs* and deciding their reasoning would govern the Circuit's jurisprudence, and then by openly distancing itself

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[20]As the *Downs* court also noted, nothing in this Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), can be read to exclude equitable tolling due to circumstances extending beyond mere attorney negligence. *Downs*, 520 F. 3d at 1319. Here, as the Eleventh Circuit acknowledged, we are dealing with "gross negligence," not garden variety, or "mere" negligence (Attachment A at 9).

from these very cases, the Eleventh Circuit in Petitioner's case effectively returned the Circuit to pre-*Downs* status by enforcing the very "bright-line" rule it rejected in *Downs*. By holding that "no allegation of lawyer negligence or of failure to meet a lawyer's standard of care" – absent bad faith, dishonesty, divided loyalty, or mental impairment on part of the attorney – can rise to the level of "egregious attorney misconduct that would entitle Petitioner to equitable tolling," the panel not only effectively overruled *Downs* and limited it in such an unprecedented way as to render its holding meaningless in cases not involving overt bad faith or dishonesty, but also aligned, once again, the Eleventh Circuit with the Seventh Circuit in its bright-line approach.

The "gross negligence" that the Eleventh Circuit found in Petitioner's case is just as deserving of equitable tolling as the lies and misrepresentations found to warrant an evidentiary hearing in *Downs*. This is not a case of garden-variety or after-the-fact miscalculation, but a flagrant failure by attorney Collins to adhere to his client's request to timely file his habeas petition. Collins gave no advance warning to Petitioner that he would not or could not timely file the habeas petition on time as promised to Petitioner and as Petitioner had repeatedly implored him to do while his appeal was still pending in the Florida Supreme Court. *See Nara v. Frank*, 264 F. 3d 310, 320 (3d Cir. 2001) (noting that evidentiary hearing warranted where petitioner alleged, *inter alia*, that habeas petition filed late because state postconviction counsel told petitioner that there were no time constraints to timely filing and led petitioner to believe a timely petition would be

filed; these "serious allegations" would constitute extraordinary circumstances, if proven to be true). *See also Baldayaque*, 338 F. 3d at 152-53.

Due to Collins's "gross negligence," Petitioner never received any communication that his appeal to the Florida Supreme Court had been denied on November 10, 2005, despite repeated requests to Collins in the preceding months for a status of the case. This failure by Collins to keep Petitioner apprised of the denial of his appeal is not only a violation of the Florida Rules of Professional Conduct,[21] but also constitute grounds for equitable tolling, at least in other circuits. "[A] prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the manner." *Woodward v. Williams*, 263 F. 3d 1135, 1143 (10th Cir. 2001). *See also Phillips v. Donnelley*, 216 F. 3d 508, 511 (5th Cir.) (Remanding for district court to determine the date on which the petitioner first received notice of the denial of his state appeal), amended in part, 223 F. 3d 797 (5th Cir. 2000); *Knight v. Schofield*, 292 F. 3d 709, 711 (11th Cir. 2002) (prisoner entitled to equitable tolling because, despite diligence, he had not been timely informed of the denial of state collateral relief); *Thompson v. Smith*, 2006 U.S. App. LEXIS 5620 at *12 (11th Cir. 2006) (unpub.) ("When outside forces, such as

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[21] *See* Rule Regulating the Florida Bar 4-1.4 (a)(1), (2) (3) & (4) (A lawyer "shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information").

the courts themselves, act independently of the petitioner to prevent him from timely filing a petition for habeas corpus, then, provided that the petitioner has exercised diligence, the district court may properly apply the doctrine of equitable tolling").

Because the Eleventh Circuit's conclusion that "gross negligence" does not qualify as an exceptional circumstance warranting equitable tolling has placed the Eleventh Circuit squarely in conflict with other circuits, and has essentially eviscerated a defendant's entitlement to equitable tolling under certain circumstances, Petitioner submits that certiorari review of the Eleventh Circuit's decision is warranted at this time.

CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner respectfully requests that the Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on this 13th day of May, 2009.

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ATTACHMENT A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 18, 2008
THOMAS K. KAHN
CLERK

No. 07-13366

D. C. Docket No. 06-20182 CV-PAS

ALBERT HOLLAND, JR.,

Petitioner-Appellant,

versus

STATE OF FLORIDA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 18, 2008)

Before EDMONDSON, Chief Judge, MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

Albert Holland (Petitioner), a prisoner on Florida's death row, filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. §

2254. The district court dismissed the petition as untimely because it was filed beyond the one-year limitations period provided by 28 U.S.C. § 2244(d)(1). On appeal, Petitioner argues that he was entitled to equitable tolling of the limitations period for filing his federal habeas petition because of egregious conduct by his counsel during his post-conviction proceedings. Seeing no reversible error, we affirm the district court's dismissal of Petitioner's petition.

I. Background

In 1996, Petitioner was convicted of first-degree murder, attempted first-degree murder, attempted sexual battery, and armed robbery.[1] The state trial court sentenced Petitioner to death on the first-degree murder conviction. In 2000, the Florida Supreme Court affirmed Petitioner's convictions and sentences, see Holland v. State, 773 So. 2d 1065 (Fla. 2000), and the United States Supreme Court denied *certiorari* on 1 October 2001. See Holland v. Florida, 122 S. Ct. 83 (2001).[2]

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[1] This conviction followed Petitioner's second trial on the charged conduct. The Florida Supreme Court overturned Petitioner's prior conviction and sentence on grounds unrelated to this appeal.

[2] In November 2001, the state circuit court appointed attorney Bradley Collins to represent Petitioner.

On 19 September 2002, Petitioner filed a motion for post-conviction relief in the state trial court. The state court denied relief, and Petitioner appealed to the Florida Supreme Court. Petitioner also petitioned the Florida Supreme Court for a writ of habeas corpus.[3] The state supreme court held oral argument on 10 February 2005.

While his post-conviction proceedings were pending in the Florida Supreme Court, Petitioner sent two letters to Collins–one on 3 March 2005, the other on 15 June 2005–in which he inquired about the status of his appeal and expressed concern about the timely filing of his federal habeas petition. Collins did not respond to Petitioner's letters.

In October 2005, Petitioner also contacted the Florida Supreme Court about the use of its website "so that he could secure the assistance of outside supporters to keep him updated about the appeal."[4] In response, the clerk of the Florida Supreme Court mailed Petitioner printouts of the website with instructions about the menu options to be used.

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[3]Unsatisfied with Collins's representation, Petitioner filed a *pro se* motion to remove Collins as counsel and to appoint other counsel in February 2004 and again in June 2004. The state opposed these motions, and the state court denied them.

[4]As an inmate on death row, Petitioner lacked access to a computer.

On 10 November 2005, the Florida Supreme Court affirmed the denial of Petitioner's motion for post-conviction relief and denied his habeas petition; the mandate issued on 1 December 2005.[5] See Holland v. State, 916 So. 2d 750 (Fla. 2005). Unaware of the state supreme court's decision, Petitioner–on 9 January 2006–wrote to Collins a third time regarding the status of his appeal and the status of his federal habeas petition. Collins had not responded to Petitioner's letter by 19 January, at which time Collins spoke to Petitioner.

On 18 January 2006, during a visit to the prison's writ room, Petitioner learned that the Florida Supreme Court denied his appeal. Petitioner telephoned Collins the next morning.[6] Later that day, Petitioner, acting *pro se*, filed a habeas petition in federal district court.

About two months later, Petitioner moved the district court to discharge Collins and to appoint new counsel. In June 2006, the district court allowed Collins to withdraw and appointed other counsel to represent Petitioner. Later, in response to a federal order to show cause, Petitioner, through current counsel (that is, not Collins), filed a pleading asserting that Petitioner was entitled to equitable

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[5]On 8 February 2006, Petitioner, through Collins, sought review of the denial of state post-conviction relief in the United States Supreme Court. The Court denied *certiorari* on 17 April 2006.

[6]Collins had written a letter to Petitioner received by Petitioner on 19 January 2006 expressing Collins's intention to file a petition for *certiorari* in the United States Supreme Court.

tolling of the limitations period for filing his federal habeas petition. The district court concluded that equitable tolling was not warranted and dismissed Petitioner's petition as untimely. The district court then granted a certificate of appealability on the following issue: "whether equitable tolling enlarged the one-year time period for [Petitioner] to file his 28 U.S.C. § 2254 petition."

II. Standard of Review

We review the district court's denial of equitable tolling *de novo*. Drew v. Dep't of Corr., 297 F.3d 1278, 1283 (11th Cir. 2002). We review a trial court's decision whether to conduct an evidentiary hearing on an equitable tolling claim for an abuse of discretion. Id.

III. Discussion

Pertinent to this case, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), imposes a one-year statute of limitations for filing a federal habeas petition that runs from the date on which the state court judgment of conviction becomes final. 28 U.S.C. §

2244(d)(1)(A). A judgment of conviction becomes final when "the Supreme Court has had an opportunity to review the case or the time for seeking review has expired." Coates v. Byrd, 211 F.3d 1225, 1226 (11th Cir. 2000). Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled for the time during which "a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

That Petitioner filed his federal habeas petition beyond the one-year limitations period provided by 28 U.S.C. § 2244(d)(1) is undisputed. Petitioner's limitations period began running on 1 October 2001, the date on which the United States Supreme Court denied *certiorari* on the direct appeal of Petitioner's convictions and sentences. Petitioner filed his motion for state post-conviction relief–a motion which tolled the limitations period–on 19 September 2002: 353 days later; thus, eleven months and nineteen days of the one-year period had expired before this state court filing.

Petitioner's post-conviction motion was denied, and the Florida Supreme Court affirmed the denial on 10 November 2005; the mandate issued on 1 December 2005. So, Petitioner then had eleven days, or until 12 December 2005, to file timely his federal habeas petition. Petitioner filed his petition on 19 January 2006: 38 days late.

Nonetheless, Petitioner's federal habeas petition may still be considered timely if he is entitled to equitable tolling. "Equitable tolling can be applied to prevent the application of AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." Helton v. Sec'y for Dep't of Corr., 259 F.3d 1310, 1312 (11th Cir. 2001). Equitable tolling is an extraordinary remedy that must be applied sparingly. Drew, 297 F.3d at 1286. "The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner." Id. "To be entitled to equitable tolling, [Petitioner] must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Lawrence v. Florida, 127 S. Ct. 1079, 1085 (2007). A truly extreme case is required.

Petitioner points to several things that he contends demonstrate extraordinary circumstances: (1) Collins's alleged "egregious conduct"; (2) the Florida Supreme Court's failure to conduct oversight of his appointed attorney; (3) the state clerk's office's failure to inform him that his appeal had been denied; and (4) the Department of Corrections's refusal to allow Petitioner access to the "writs

room."[7] Petitioner argues that these circumstances are extraordinary and both beyond his control and unavoidable despite his diligent efforts. We disagree.

On Collins's alleged "egregious conduct," this Court has said repeatedly that even attorney negligence is not a basis for equitable tolling. Helton, 259 F.3d at 1313; Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000); Sandvik v. United States, 177 F.3d 1269, 1271-72 (11th Cir. 1999); see also Lawrence, 127 S. Ct. at 1085 ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel."). But recently we addressed whether attorney misconduct going beyond "mere negligence" may constitute an extraordinary circumstance warranting equitable tolling. See Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008).

In Downs, we vacated a district court order dismissing a habeas petition as untimely based on counsel's alleged behavior that "ran the gamut from acts of mere negligence to acts of gross negligence to acts of outright willful deceit." Id. at 1323. Although we viewed counsel's behavior as a whole, it is material to the Downs decision that the alleged acts of attorney misconduct included affirmative

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[7] Petitioner also notes his "long history of mental illness" as a factor in evaluating his claim for equitable tolling. Petitioner does not explain how his "mental illness" had a material effect on his failure to file timely his habeas petition.

misrepresentations by counsel about the filing of a state habeas petition: such a filing would have tolled the federal habeas limitations period.[8] Id. at 1323-24. In Downs, we repeatedly and specifically noted counsel's lie: one that deprived the unknowing petitioner of as many as three months of his limitations period before it was discovered.[9] Id.

In contrast to Downs, Petitioner made in the district court no allegation of knowing or reckless factual misrepresentation or of lawyer dishonesty. Instead, Petitioner's allegations are limited to Collins's failure to communicate with Petitioner on the status of his case and to Collins's failure to file a federal habeas petition timely, despite repeated instructions to do so. We will assume that Collins's alleged conduct is negligent, even grossly negligent. But in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care–in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part–can rise to the level of

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[8] In two recent unpublished decisions, we reached similar conclusions. See Kicklighter v. United States, No. 07-14945, 2008 WL 2421728 (11th Cir. June 17, 2008) (unpublished); Hammond v. Frazier, No. 07-10573, 2008 WL 1891478 (11th Cir. Apr 30, 2008) (unpublished). Both cases involved allegations of affirmative misrepresentations by counsel. Kicklighter, 2008 WL 2421728, at *1 (petitioner alleged that counsel "lied to him about whether the appeal had been filed"); Hammond v. Frazier, 2008 WL 1891478, at *1 (petitioner alleged that "post-conviction counsel falsely told him that counsel had filed the state habeas petition").

[9] The defendant in Downs missed the deadline for filing his habeas petition by only eight days.

egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This case is a pure--professional--negligence case. We decline to extend Downs to the different facts of this case.[10]

In a similar way, we are not persuaded that the alleged acts of the Florida Supreme Court or the Department of Corrections would entitle Petitioner to equitable tolling. The alleged failure by the Florida Supreme Court to conduct oversight of Petitioner's appointed attorney is not an "extraordinary circumstance" entitling Petitioner to equitable tolling. See Lawrence, 127 S. Ct. at 1085-86 (that a state court appoints and supervises counsel "does not make the State accountable for a prisoner's delay"). And Petitioner presents no evidence that he ever asked--before the limitations period for filing his federal habeas petition had run--that the Florida Supreme Court provide him directly with notice of the decision on his post-conviction appeal. The letter that Petitioner presents to support his contention that the Florida Supreme Court should have provided him with notice was dated 21 December 2005: nine days after Petitioner's deadline for

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[10]We recall the maxim that "[e]very exception not watched, tends to take the place of the rule." See S. Peloubet, Legal Maxims 294 (1884) (1985 ed.) ("Toute exception non surveillee tend a prendre la place du principe."). We are attempting to keep the exception for extraordinary circumstances from being the rule.

filing his federal habeas petition had passed. Likewise, the incident in which the Department of Corrections allegedly denied Petitioner access to the "writs room" took place on 9 January 2006, 28 days beyond the limitations period. Even assuming the allegations are true, Petitioner cannot reasonably argue that the incidents to which he draws our attention–both occurring after the limitations period had run–prevented him from filing a federal habeas petition timely.

We are satisfied that the district court did not err in declining to hold an evidentiary hearing on the issue of equitable tolling. "Section 2244 of Title 28 of the United States Code does not require a hearing on the issue of time-bar or equitable tolling, so the decision as to whether to conduct an evidentiary inquiry is a matter left to the sound discretion of the district court." Drew, 297 F.3d at 1292. Petitioner has offered no reason to believe an evidentiary hearing would help him demonstrate the required extraordinary circumstances to warrant equitable tolling.

IV. Conclusion

For the foregoing reasons, the district court's dismissal of Petitioner's petition for a writ of habeas corpus as untimely is affirmed.

AFFIRMED.

ATTACHMENT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 13 2009
THOMAS K. KAHN
CLERK

No. 07-13366-p

ALBERT HOLLAND, JR.,

Petitioner-Appellant,

versus

STATE OF FLORIDA,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

J. E. Edmondson

CHIEF JUDGE

ORD-42
(2/05)

B

ATTACHMENT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-20182-CIV-SEITZ

ALBERT HOLLAND, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY FILED

THIS MATTER is before the Court on Respondent State of Florida's (the "State") Response to Order to Show Cause [DE-14], in which it argues that Petitioner's application for a writ of habeas corpus [DE-1] is untimely and should be dismissed. Petitioner filed a reply [DE-35], arguing that his petition is timely under a theory the United States Supreme Court recently rejected and asking the Court to apply equitable tolling, in any event. The Court allowed the State to file a sur-reply responding to Petitioner's equitable tolling argument. Upon review of the record, the applicable law, and the pertinent facts of this case, the Court finds that Petitioner's application for habeas relief is untimely and should not be equitably tolled.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or about August 16, 1990, Petitioner Albert Holland was indicted in Broward County, Florida, on four counts – including first-degree premeditated murder. A jury convicted him on all four counts, and he was sentenced to death on the first-degree murder count, life imprisonment for sexual battery, 40 years for attempted first-degree murder, and 17 years for armed robbery. On appeal, the Florida Supreme Court reversed the convictions and remanded the case for a new trial. *See generally Holland v. State*, 636 So. 2d 1289 (Fla. 1994).

On retrial, another jury found Petitioner guilty.[1] Once again, the trial court sentenced Petitioner to death on the first-degree murder count. This time, on appeal, the Florida Supreme Court affirmed Petitioner's conviction and death sentence, and the United States Supreme Court denied *certiorari* on October 1, 2001. *See generally Holland v. State*, 773 So. 2d 1065 (Fla. 2000), *cert. denied*, 534 U.S. 831 (2001).

On or about September 19, 2002,[2] 353 days later, Petitioner filed his application for state post-conviction relief, which tolled the one-year time limit for filing his federal habeas petition under 28 U.S.C. § 2254. The court denied relief, and on appeal, the Florida Supreme Court affirmed this decision. *See generally Holland v. State*, 916 So. 2d 750 (Fla. 2005). The mandate issued on December 1, 2005. Petitioner then sought review of the denial of state post-conviction relief in the United States Supreme Court. The United States Supreme Court denied *certiorari* on April 17, 2006. *See generally Holland v. Florida*, 126 S. Ct. 1790 (2006). In the meantime, on January 19, 2006, Petitioner, acting *pro se*, filed the present federal habeas petition.

II. DISCUSSION

A. The Pendency of a *Cert* Petition in the United States Supreme Court Does Not Toll the One-Year Time Limit for Filing a Federal Habeas Petition Under § 2244.

A prisoner in state custody has one year to seek federal habeas corpus relief once his state court judgment of conviction becomes final. *See* 28 U.S.C. § 2244(d). The judgment becomes final when "the Supreme Court has had an opportunity to review the case or the time for seeking review has expired." *Coates v. Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000) (citing *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir.1999)). Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled for the time during which "a

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[1] On the sexual battery count, a jury found Petitioner guilty of the lesser offense of attempted sexual battery.

[2] The State has identified this date as the date on which Petitioner filed his state-court motion. Petitioner has identified September 17, 2002 as the date on which he filed his state-court motion.

properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

Petitioner's judgment and conviction became final on October 1, 2001. Petitioner filed his application for state post-conviction relief 353 days later, on September 19, 2002. The filing of his state habeas petition stopped the clock temporarily. Once the Florida Supreme Court issued its mandate on December 1, 2005, affirming the denial of state habeas relief, Petitioner had just 12 more days – until December 13, 2005 – to file his federal habeas petition. Petitioner did not file his federal petition until more than a month later, on January 19, 2006.

Petitioner had argued to this Court that the filing and pendency of his *cert* petition in the United States Supreme Court tolled his one-year time limit for filing his federal habeas petition. The parties had been awaiting a decision from the United States Supreme Court on this very question. On February 20, 2007, the United States Supreme Court squarely held that the time during which a *cert* petition is pending does not toll the one-year statute of limitations pursuant to 28 U.S.C. § 2244(d). *Lawrence v. Florida*, 127 S. Ct. 1079, 1081 (2007). Thus, Petitioner's first argument fails.

B. Equitable Tolling Is Not Warranted in This Case.

Although the United States Supreme Court has yet to decide whether the doctrine of equitable tolling applies to extend the one-year limitations period set forth in 28 U.S.C. § 2244, the Eleventh Circuit has held that it does. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Id.* A district court can allow equitable tolling where a movant files a habeas petition untimely "because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Id.* (quoting *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)) (emphasis added). However, this should be done only in "rare and exceptional circumstances," such as when the State's conduct prevents timely filing. *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005) *aff'd*, 127 S. Ct. 1079 (2007); *see also Arce v. Garcia*, 400

F.3d 1340, 1349 (11th Cir. 2005) (noting that, in order to invoke equitable tolling, "courts usually require some affirmative misconduct").

Petitioner bears the burden of establishing his entitlement to this extraordinary remedy. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir. 2002), *overruled in part on other grounds by Sykosky v. Crosby*, 187 Fed. Appx. 953 (11th Cir. 2006). Here, Petitioner posits five arguments for equitable tolling: (1) the Florida Supreme Court's failure to oversee his former State-appointed attorney, Bradley M. Collins, Esq.;[3] (2) the Florida Supreme Court's Clerk's Office's failure to inform him that mandate had issued in his post-conviction appeal; (3) the Department of Corrections' ("DOC") "refusal" to allow him access to the "Writs" room; (4) Collins' failure to keep him informed of the status of his case and to timely file the federal habeas petition; and (5) his long history of mental illness, which prevented him from timely filing his petition. As shown below, all of these arguments lack merit.

1. The Florida Supreme Court's failure to oversee Collins

Petitioner claims that the Florida Supreme Court's failure to oversee Collins' efforts should allow for equitable tolling. Petitioner is incorrect. This does not constitute an extraordinary circumstance warranting equitable tolling. *See Lawrence*, 421 F.3d at 1226 (State's provision of an inadequate or incompetent attorney is not a basis for equitable tolling).

2. The Florida Supreme Court's failure to inform him that mandate had issued

Petitioner next argues that the Florida Supreme Court's failure to advise him that mandate had issued in his post-conviction appeal likewise should allow for equitable tolling. This argument also misses its mark. Petitioner's situation is distinguishable from the scenario in *Knight v. Schofield*, 292 F.3d 709, 710-11 (11th Cir. 2002), in which the Clerk of the Georgia Supreme Court specifically assured inmate Knight that he would be notified as soon as a decision in his case issued, but inadvertently sent

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[3] Collins was appointed for post-conviction purposes when the Office of Capital Collateral Regional Counsel - South withdrew from Petitioner's case because of caseload conflict.

notice of the decision to the wrong person. Knight showed diligence by trying to contact the Clerk when he never received a response. *Id.* at 711. Accordingly, the Eleventh Circuit reversed the district court's denial of equitable tolling, finding that "[u]ntil the clerk responded, Knight had no way of knowing that his state remedies had been exhausted." *Id.* at 711.

Here, Petitioner never argues that someone in the Clerk's Office promised to inform him of the outcome of his case. Further, there is no evidence that Petitioner ever contacted the Florida Supreme Court to request a copy of its decision and/or mandate denying post-conviction relief. Petitioner did contact the Florida Supreme Court for other reasons, though – for example, (1) to seek Collins' removal as his attorney (*i.e.*, Feb. 23 and June 17, 2004); and (2) to request copies of various pleadings, other court filings, and dates of Orders (*i.e.*, Nov. 17 and Nov. 24, 2003; Jan. 23, Apr. 29, and Aug. 26, 2004). (Pet'r's App. [DE-38] I and J.) Just as Petitioner directly sought to have the Florida Supreme Court send him certain information, he could have asked it to send him notice of the mandate denying state post-conviction relief.[4]

3. The DOC's alleged refusal to allow Petitioner access to the "Writs" room

Petitioner alleges that the DOC denied him access to the "Writs" room, and that this should serve

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[4] In his reply, Petitioner notes, without any evidentiary support, that he contacted the Florida Supreme Court in October 2005 to determine how to find his case on its website so that he could "secure the assistance of outside supporters to keep him updated about the appeal." (Pet'r's Reply [DE-35] at 18). He has only filed in the record copies of certain pages of the website apparently sent to him, without offering any evidence to show that he needed the website to secure "outside supporters." (Pet'r's App. N.) He also does not discuss what efforts he made to find such "outside supporters" once he received information about the website or how these outside supporters were going to keep him apprised of the status of his case.

Petitioner also conflates a communication regarding the direct appeal of his conviction and sentence on re-trial with his case for post-conviction relief. He emphasizes a letter he sent to the Florida Supreme Court on December 21, 2005, which he does not include in his Appendix. The Florida Supreme Court (Office of the Clerk) sent Petitioner a response to this letter, which Petitioner includes as Appendix P. The response noted that Petitioner had inquired as to the date "Mandate issued in [Case No.] SC89922 [the direct appeal of his conviction and sentence on re-trial]." (Pet'r's App. P.) In the response, the Clerk of the Court advised Petitioner that he needed to contact the Florida State Archives, as the case file had been sent there. (*Id.*) Contrary to Petitioner's characterization of the response as "acknowledging that Petitioner's request was also for a status of Case No. SC03-1033 [regarding his motion for state post-conviction relief]," the text of the Clerk's response does not so indicate.

as a basis for equitable tolling. Counsel for the State asserts that a notation of "refused" on the "Northeast Unit Writ Room Callout" sheet means that the inmate refused, not that prison officials denied him access to the room. (State's Sur-Reply ¶ 9.) The Court has no way of verifying this information; however, the mere assertion that the DOC denied Petitioner access to the "Writs" room does not constitute an extraordinary circumstance such that equitable tolling is justified. This allegation is similar to an allegation of deficiencies in or lack of access to a prison law library[5] – which the Eleventh Circuit has held does not provide a basis for equitable tolling, without more. *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313-14 (11th Cir. 2001) (inmate's bare allegation of prison library's deficiency insufficient; no evidence as to when inmate learned of alleged deficiency or any efforts taken to remedy such deficiency); *Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir. 2000) (prisoner's mere inability to access law library is not, in itself, an unconstitutional impediment; inmate must show such inability caused actual harm); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (inmate offered no specificity as to allegation of lack of access to legal materials; "[i]t is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate").

Here, Petitioner offers no specific information about the connection between his denial of access to the "Writs" room and the delay in filing his federal habeas petition. He also does not discuss his efforts to gain access to the "Writs" room once he was denied: did he seek out a reason for the denial? what was the response? how many times did he try to gain access to the room after the denial? was he denied each time? what was the reason given for the subsequent denials? Petitioner provides nothing but the bald assertion of his lack of access to the room. This is insufficient to establish an entitlement to equitable tolling.

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[5] The Court assumes that the "Writs" room is a type of prison law library.

4. Collins' failures as Petitioner's appointed counsel

Petitioner asserts that Collins failed to timely file the instant habeas petition and failed to keep him informed of the status of his case, and that such failures should allow for equitable tolling. It is well-settled that attorney negligence in calculating deadlines and understanding the law on habeas relief is not a basis for equitable tolling. *Helton*, 259 F.3d at 1313 (agreeing that attorney mistake does not warrant equitable tolling); *Steed*, 219 F.3d at 1300 ("[a]ny miscalculation or misinterpretation . . . in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling"). As for Collins' alleged failure to keep Petitioner informed of the status of his case, the record shows that Collins met with Petitioner on death row and communicated with him in writing on several occasions,[6] provided to Petitioner a detailed, written explanation of the strategy for the case, pursued state collateral relief for Petitioner, and filed a petition for a writ of *certiorari* from the United States Supreme Court. Collins had also prepared a proposed federal habeas petition on Petitioner's behalf and sent it to Petitioner for his review, "suggesting that Holland either sign the Petition for filing or indicate that he would prefer [Collins] comply with Holland's repeated requests that [Collins] move the trial court for leave to withdraw as counsel of record."[7] (State's App. [DE-41] Ex. 1.) Petitioner never responded to Collins' correspondence. (*Id.*)

Rather than cooperate with Collins, Petitioner filed numerous *pro se* motions during the time Collins represented him.[8] He repeatedly expressed his desire for Collins to withdraw from the case and

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[6] The record evidence shows that Collins wrote at least eight letters to Petitioner – one undated letter (but sometime after May 30, 2002); one letter on December 23, 2002; one letter on January 22, 2003; letters on January 14, June 15, and July 19, 2004; and letters on January 18 and January 31, 2006.

[7] This is taken from paragraph (d) of Collins' March 24, 2006 motion to withdraw as Petitioner's counsel. It appears that, had Petitioner signed the document Collins drafted, his federal petition would still have been late. Even so, as discussed earlier, attorney negligence in filing a habeas petition does not constitute an extraordinary circumstance.

[8] A defendant does not have a right to "hybrid" representation – that is, to proceed *pro se* while simultaneously being represented by an attorney. *Cross v. United States*, 893 F.2d 1287, 11291-92 (11th Cir. 1990).

actively sought Collins' removal by filing motions to this effect on February 23 and June 17, 2004. Indeed, according to Collins, Petitioner "has complained of conflicts with every counsel he has had since the beginning of his case, including trial counsel in his first trial and again different counsel in his retrial."[9] (*Id.*)

Even if Collins was so careless in keeping Petitioner apprised of his case that his behavior could be characterized as an "extraordinary circumstance," Petitioner must still show that he acted with due diligence in order to be afforded equitable tolling. The record shows that he wrote a few letters to his attorney, but he did not seek any help from the court system to find out the date mandate issued denying his state habeas petition, nor did he seek aid from "outside supporters" he claimed he wanted to enlist to help him. This does not demonstrate due diligence. *See Powe v. Culliver*, Case No. 05-17150, 2006 WL 3253960, at *4 (11th Cir. Sep. 19, 2006) (finding "arguably extraordinary" circumstances because of attorneys' failures to respond to petitioner's letters, but holding that petitioner did not show due diligence – where he wrote just three letters to his attorneys, did not seek further help from the trial court, and failed to file his state habeas petition on his own, even without a copy of his trial transcript).

5. Petitioner's long history of mental illness

In his brief, Petitioner alludes to his long history of mental illness as a basis for equitable tolling. Petitioner must be able to establish a causal connection between his mental incapacity and his ability to file a petition timely; the mere contention of mental incapacity, without more, is insufficient. *Lawrence*, 421 F.3d at 1226-27. Petitioner has offered no such connection. Indeed, as the State points out, Petitioner's conduct belies any claim that his mental illness prevented him from discovering through appropriate diligence the date his post-conviction appeal was decided and mandate issued. Petitioner has

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[9] This statement is taken from a letter written by Collins' attorney, Kevin J. Kulik, in response to Petitioner's complaint to The Florida Bar regarding Collins. The Court notes that The Florida Bar did not initiate an investigation of Collins' conduct, finding that the issues Petitioner raised "did not rise to the standard of a violation of The Rules Regulating The Florida Bar." (Pet'r's App. H.)

repeatedly sought to represent himself, filing several *pro se* motions and other documents with the Court even while represented by counsel. He has written numerous, cogent letters to counsel, the DOC, the courts, and The Florida Bar (complaining about his attorney's alleged incompetence). He has sought from the Florida Supreme Court copies of various pleadings and other filings in his state habeas case. What this shows is that Petitioner was certainly capable of using due diligence to ascertain his filing deadline for the instant habeas petition, but did not. Accordingly, it is hereby

ORDERED that:

(1) Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE-1] is DENIED AS UNTIMELY FILED;

(2) All pending motions not otherwise ruled upon in this Order are DENIED AS MOOT; and

(3) This case is CLOSED.

DONE and ORDERED in Miami, Florida, this 27th day of April, 2007.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record